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91-58

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LEWIS G. ROBINSON, PETITIONER

v.

JOHN H. ENGLAND, JR., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEWIS G. ROBINSON, PRO SE PETITIONER
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1990.

QUESTIONS PRESENTED FOR REVIEW

May a Federal Appeals Court justifiably and legally refuse to take Jurisdiction of an Appeal as untimely be based upon the date of receipt by it's Clerk of Court, instead of the proven timely date of Certified mailing as provided for by Supreme Court Rule 29.2-3 exception if the service is by mail service is complete on mailing, and F.R.C.P. 6(E) and F.R.A.P. 25(A), 26(C), by mailing three (3) days shall be added to the filing time.

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NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

LEWIS G. ROBINSON,

Petitioner,

vs.

JOHN H. ENGLAND, JR.

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Lewis G. Robinson, respectfully prays that a Writ of Certiorari Issue to review the Judgement and Opinion of the Eleventh Circuit Court of Appeals issued November 13th, 1990 because no other remedy exist at Law or Equity to prevent irreparable injury and the permanant denial of Due Process and Equal Protection cast upon him by the Appellate Court's Decision.

JURISDICTION

JURISDICTION OF THIS COURT IS SOUGHT UNDER SUPREME COURT RULE 17.(C)

The original Federal Jurisdiction of this Case is based upon Title 28, Sec: 1332; wherein the Plaintiff/ Petitioner is a resident of Ohio, and the Defendant/ Respondent is a resident of Alabama.

Petitioner is seeking the issuance of a Writ of Certiorari from this Court because there exist, in this Case, exceptional circumstances which determines the power of the Supreme Court to supervise and enforce uniform Rules of Civil Procedure throughout the Federal Court System, and whether an Appellate Court can refuse Jurisdiction based upon it's interpretation of the Rules even when it's Decision is contrary to the Rules established by the Supreme Court and it's own prior Decision.

The Petitioner is seeking an Order from this Court to remand this Case to the District Court for Trial. The facts will show that such an Order is necessary because no other remedy exist in Law or Equity to prevent irreparable injury to Petitioner.

The Petitioner is Appealing the Dismissal of his Appeal by the Eleventh Circuit Court for want of Jurisdiction, because his Appeal was "untimely", dated February 27, 1991.

The Plaintiff also request this Court to remand this Case to the District Court because U.S.C. Title 5 Sec: 6103, CIV: R.6(A) designates Legal Holidays, on which no Federal Courts are to be opened to conduct business, the District Court illegally ordered a Trial of this Case on a National Legal Holiday; and as such, the Court lacked Jurisdiction, power and authority over the parties to decide the rights, obligations, and duties of the parties in dispute. The unauthorized action by the Court is void on it's face.

The ministerial act by the Deputy Clerk in dismissing Plaintiff's Action with Prejudice under CIV R. 41, is void for want of authority to perform a judicial act.

FACTS

The District Court scheduled this Case for Trial without written Notice, on Monday, November 12th, Veteran's Day of 1990 in Birmingham, Alabama at 9:00 A.M., a National Holiday, on which no Federal Courts are

to hold a Trial. At 9:30 A.M. on Veteran's Day, Petitioner received a phone call from the Trial Judge ordering Petitioner to appear for Trial within the hour or my Case would be Dismissed for lack of Prosecution. Petitioner was in Decatur, Alabama, 85 miles away, preparing for a Trial on Tuesday.

On Tuesday, November 13th, 1990, the Court Dismissed my Case with Prejudice.

On Tuesday, December 11th, 1990, Petitioner filed his Notice of Appeal via Certified Mail.

The District Court Clerk signed the receipt dated: Monday, December 17th. Normal mail - Cleveland to Birmingham, takes three (3) days and should have arrived on Friday, the 14th.

The Appellate Court Dismissed my Appeal as "untimely", even though CIV. R. 5(B) F.R.A.P. Rule 25(C) states: "Filing shall be deemed filed on the date of mailing", and Rule 26(C) and Rule 6(E) states: "Three (3) days shall be added when the mail is used" which would have made the last date for filing, Monday, December 17th, the date stamped on the Petitioner's Certified Mailed receipt by the Clerk. (See Supreme Clerk Rule 29.2-3).

CITATIONS

(1). SERVICE COMPLETE ON MAILING:

Kim v. Commandant, Defense Language Institute, C.S. 9th, 1985, 772 F. 2d 521.

The Habeas Petitioner's Motion for a Rehearing, is treated as a Motion, to alter or amend the Judgement, was timely when the record disclosed that the Motion was placed in the mail on the last day for serving the Motion. Smith v. U.S. Parole Commission, C.A. 11th, 1983, 721 F. 2d 346.

Pacific Maritime Association v. Quinn, C.A. 9th, 1972, 465 F. 2d. 108.

Claybrook Drilling Co. v. Divanco, Inc., C.A. 10th, 1964. 336 F. 2d 697.

A Motion for a new Trial that was mailed to the Plaintiff on the 10th day after Judgement was timely. Kathriner v. City of Overland, Missouri, D.C. Mo. 1984, 602 F. Supp. 124.

"Motion To Stay Execution of Civil Judgement" mailed to all Counsel within 10 days after Entry of Judgement constituted proper, timely service. Non-Punitive Segregated Inmates of Holmesburg Prison v. Kelly, D.C. Pa. 1984, 589 F. Supp. 1330.

When a copy of the Complaint and Summons in an Admiralty Case has been mailed to the United States Attorney and Attorney General on the last day of the limitation's period, computed using the Federal Rule, service was complete on mailing and the third-party Plaintiff was to be allowed to amend it's Complaint, pursuant to the Rule, so as to name the United States as a third-party Defendant. Dillingham Corp. v. Hawk, D.C. Haw. 1983, 97 F.R.D. 450.

If the Trial was held, the Petitioner nor Respondent could have received a fair Trial. It would have been impossible to hold the Trial on Veteran's Day in Birmingham. The largest military parade in America started at 11:00 A.M. It passed the Court for 2-½ hours. General Colin Powell was the Honored Guest with his wife, a native of Birmingham. Over 100,000 people lined the streets. This happened at the height of the preparation for War vs. Iraq. It was impossible for a Jury to concentrate on a Trial.

Petitioner therefore, request this Court grant Certiorari and remand this Case to the District Court as a matter of Law.

This is a proceeding for Compensatory and Punitive damages against the Respondent, an Attorney, for Breach of Contract, a conscious and intentional disregard of the Code of Professional responsibility, malfeasance and misfeasance.

On October 23, 1987, after denial by 27 Lawyers over a period of four (4) years, Petitioner filed a Pro Se Malpractice Suit against J. Doyle Fuller for negligence due in part to drug abuse. Petitioner

successfully maintained his Suit against Respondent by overcoming Respondent's various attempts to Dismiss. (Robinson v. Fuller, U.S.D.C. 87-H-1048 N).

Petitioner earned his J.D. Degree from New England Law School in Boston, Mass. in 1956, but has never engaged in the practice of Law. Petitioner states that since he had no Court Room experience, he hired the Respondent on August 12th, 1988 to assist him in the Prosecution of his grievances against Attorney J. Doyle Fuller. Petioner paid Respondent a retainer of $1,000.

On August 22, 1988, Fuller filed his second Motion For Summary Judgement. Petitioner filed an extensive Brief detailing facts, Law, and documents which presented substantial evidence to which the Court was obliged to submit to a Jury to determine if Mr. Fuller had performed in the manner of and exercised the diligence, knowledge, experience and investigative analysis as an expert for which he was hired and which he admitted in his Deposition. He considered and held himself out to the Petitioner to be an expert. (Fuller's Deposition).

On October 3rd, Defendant England filed his Answer to Fuller's Motion For Summary Judgement. Defendant England's Motion agreed with Fuller's Motion and was

diametically opposed to his Client's (Petitioner) Brief in opposition to Fuller's Motion.

Mr. England's action was against the wishes and desires of the Petitioner, his employer. Petitioner never authorized Defendant's actions and diametically opposed to his Contract of employment.

The Memorandum opinion of the District Court Judge is based upon and is quoted on Page 2: "Counsel for Plaintiff, Mr. England . . . . concluded that Defendant Fuller had met the standards of care for Attorney's handling Appeals in the State of Alabama. He further concluded that Defendant addressed all the Appealable issues in his Brief".

Petitioner contends that but for the Brief of Defendant England, the Court would not have awarded Summary Judgement to Defendant Fuller.

The Court further states: "given this response, (of Petitioner's Counsel- Defendant England), ths Court is compelled to conclude that there is no genuine dispute as to any issues of material fact, and that Defendant is due to be granted Summary Judgement as a matter of Law".

Petitioner has, and the Rules provide no other remedy or procedure for Relief except the Common-Law Writ of Certiorari under 28 U.S.C. Sec: 1651(A) Writs.

"The Supreme Court and all Courts established by Act of Congress, may issue all Writs necessary or appropriate in aid of their respective Jurisdictions and agreeable to the usages and principles of Law".

The Appellate Court's reliance upon it's Decision in Campbell v. Wainwright, 726 F. 2d 702 (1984 11 Cir.) is not applicable to this Case.

Campbell holds that, "though Plaintiff's Appeal was timely filed and was properly before the Court, Defendant, who's Notice of Appeal was ineffective, could not use it as a vehicle for launching his own attack upon the Judgement".

"Defendant's Notice of Appeal was ineffective since it was filed while Plaintiff's Motion to alter or amend the Judgement, was pending. F.R.C.P. 59(E) 28 U.S.C.A., F.R.A.P. Rule 4(A) 4."

"The Court should stand on it's Decision in Smith v. U.S. Parole Commission Supra, 11th Cir. 1983 - "Petitioner's Motion was timely when record shows it was placed in the mail on the last day for filing the Motion.

SUMMARY

The rejection of Petitioner's Appeal by the Court of Appeals as "untimely" was in error and conclusive in it's denial of Petitioner's right to Due Process and Equal Protection.

The F.R.C.P. and F.R.A.P. cited and Supreme Court Rule 29.2-3, and Cases cited specifically state: "deposit of a Legal Paper in U.S. Mail, properly addressed and stamped SHALL BE DEEMED TIMELY FILED, AND WHEN SERVICE IS MADE BY MAIL, THREE (3) DAYS SHALL BE ADDED TO THE TIME FOR FILING. The Dismissal of Plaintiff's actions by the Deputy Clerk is illegal and void. The holding of Trial by the District Court on a Legal Holiday without Notice is illegal and void.

The Rules are mandatory and obviates any discretion by the Appellate Court. Therefore, this Court, in adherence to it's supervisory power and authority to maintain uniformity of it's universal mandate for conformity in our judicial system, should remand this Case to the District Court for Trial on it's merits

to insure that Petitioner's right to Due Process and Equal Protection will not be abridged or denied.

HUMBLY SUBMITTED,

Lewis G. Robinson

LEWIS G. ROBINSON
3646 Hildana Road
Shaker Heights, Ohio 44120
1-216-921-4107

CERTIFICATE OF SERVICE

A copy of this Motion has been served upon Defendant via. U.S. Certified Mail this 2 day of July, 1991 to England and Bivens 2616 8th Street, Tuscaloosa, Alabama 35401.

Lewis G. Robinson

Lewis G. Robinson

Respondent's Counsel
John A. Bivens
2616 8th Street
Tuscaloosa, Ala., 35401
1-205-759-5401

APPENDIX A.

J U D G M E N T

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
Southern Division

(Filed - Nov. 13,PM 1990)

LEWIS G. ROBINSON,
Plaintiff

JUDGMENT

vs.

CASE NO. CV 89-P-18

JOHN H. ENGLAND, JR.,
Defendant

(ENTERED - Nov. 13th, 1990)

CLERK'S COURT MINUTES

This action came on for Trial on November 12, 1990, before the Honorable Sam C. Pointer, Jr., Chief United States District Judge, presiding.

It is ORDERED and ADJUDGED that the Plaintiff, having failed to appear, this case is dismissed pursuant to Rule 41 with prejudice for want of prosecution.

CHARLES T. CLIVER, CLERK

DATED: November 13, 1990

By:
Deputy Clerk

Birmingham, Alabama

Court Reporter: Karla Odom

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-7878

LEWIS G. ROBINSON, Plaintiff-Appellate

versus

JOHN H. ENGLAND, JR., Defendant-Appellee

Appeal from the United States District Court
For The
Northern District of
Alabama

Before JOHNSON, HATCHETT and DUBINA, Circuit Judge

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. The Notice of Appeal was untimely because it was not filed in the district court within thirty (3) days of the entry of the district court's final judgment. Fed. R. App. P. 4(a) (1); Campbell v. Wainwright, 726 F. 2d 702, 703 (11th Cir. 1984). Contrary to Appellant's contention, neither Fed. R.App.P. 25(c) nor Fed.R. App.P. 26(c), concerning the timeliness of documents

served by mail, is applicable to the filing of a Notice of Appeal, which must be received by the District Court within thirty (3) days of the entry of the District Court's final judgment.

ISSUED AS MANDATE: February 27, 1991